

National Labor Relations Board



Weekly Summary of NLRB Cases

Division of Information

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CASES SUMMARIZED
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Airborne Freight Corp. (8-CA-28047, et al.; 343 NLRB No. 72) Beachwood and Middleburg, OH Nov. 19, 2004. Chairman Battista and Member Schaumber adopted certain of the administrative law judge's findings that the Respondent, by its numerous unfair labor practices, violated Section 8(a)(1) and (3) of the Act and his recommendations to dismiss certain other complaint allegations. Member Liebman dissented in part. [\[HTML\]](#) [\[PDF\]](#)

The complaint included allegations that Robert Hearn was unlawfully discharged on four occasions between January 1996 and January 1998. Under the terms of the parties' collective-bargaining agreement, the record showed that some of Hearn's discharges were either set aside or reduced to suspensions based on determinations made by a "grievance panel" or by the Ohio Joint State Grievance Committee. At issue is whether the Board should defer to these grievance determinations.

The majority dismissed the complaint allegations that Hearn was unlawfully discharged on January 29 and February 6, 1997 and deferred to the decisions of the joint state grievance boards resolving Hearn's grievances over his January 29 and February 6, 1997 discharges. They determined, as did the judge, that Hearn's discharges of July 1, 1997 and January 20, 1998 were lawful as the Respondent showed that it would have discharged him based on his overall work record.

In partial dissent, Member Liebman would find, contrary to her colleagues, that the Respondent committed unfair labor practices by: giving Hearn a warning for causing a preventable accident with a tow motor on June 6, 1997 because the Respondent failed to show that Hearn would have been given the warning absent his union activities; discharging Hearn in July 1997 and January 1998 because the Respondent failed to meet its affirmative burden under *Wright Line* to justify these discharges; transferring John Krokey to an inferior route, thereby reducing his opportunity for overtime; and transferring John Mauer to a less desirable route.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Teamsters Local 407 and Michael E. Shuba, Robert Hearn, John J. Krokey, John Mauer, and Wilma J. Conley, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Cleveland, Oct. 26-30 and Nov. 6-7, 1998. Adm. Law Judge C. Richard Miserendino issued his decision Dec. 23, 1999.

Allied Mechanical, Inc. (31-CA-26120, et al., 31-RC-8202; 343 NLRB No. 74) Ontario, CA Nov. 19, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing written disciplinary notices to and discharging employees Timothy Hays and Walter Reddoch on January 23, 2003, and disciplining Marcelo Pinheiro on January 31 and March 25, 2003. It also agreed with the judge's finding that the Respondent violated Section 8(a)(1) by impliedly and coercively telling an employee that the Respondent had retaliated against employees by reducing employees' hours; threatening an employee with unspecified reprisals by telling him he would lose by supporting the Steelworkers; and prohibiting the posting of union literature. [\[HTML\]](#) [\[PDF\]](#)

Members Walsh and Meisburg sustained the Steelworkers' Objection 9 concerning the Respondent's enforcement of its posting policy during the first few weeks of the critical period and found it unnecessary to pass on the Union's Objections 2 and 5. Unlike his colleagues, Member Schaumber would overrule the Union's Objections 2, 5, and 9. The Board overruled the Union's Objections 1, 3, and 4, set aside the election held in Case 31-RC-8202 on March 6, 2003, and remanded the case to the Regional Director for the purpose of conducting a new election.

The judge recommended that three of the Union's election objections be sustained, three objections be overruled, and that the Respondent be ordered to bargain with the Union pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Contrary to the judge, the Board determined that a *Gissel* bargaining order is not necessary and that the holding of a rerun election will satisfactorily protect and restore the employees' Section 7 rights.

In the absence of exceptions, the Board dismissed the complaint allegations that the Respondent violated Section 8(a)(3) and (1) regarding employee Marcello Pinheiro's postelection performance review, reduction of hours, and selection for layoff, and Section 8(a)(1) regarding Respondent's preelection reduction in employees' hours in retaliation to employees' union activity.

(Members Schaumber, Walsh, and Meisburg participated.)

Charges filed by Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles, Sept. 8 thru 12, 2003. Adm. Law Judge Lana H. Parke issued her decision Dec. 19, 2003.

Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia (7-CA-44877; 343 NLRB No. 75) Livonia, MI Nov. 19, 2004. The Board, in a 3-2 decision involving Lutheran Heritage Village-Livonia, concluded that the maintenance of work rules prohibiting "abusive and profane language," "verbal, mental and physical abuse," and "harassment...in any way" could not reasonably be understood as interfering with employees' Section 7 rights under the National Labor Relations Act. The majority consisted of Chairman Battista and Members Schaumber and Meisburg. Members Liebman and Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The decision adopts the reasoning of the District of Columbia Circuit in *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). That court reversed a 2000 decision of the Board (reported at 331 NLRB 291). In *Adtranz*, the District of Columbia Circuit concluded that a rule prohibiting abusive or threatening language was lawful because it was based on the employer's legitimate right to establish a "civil and decent" workplace and to protect itself from liability for workplace harassment by maintaining rules prohibiting conduct that could lead to liability. Adopting the court's view, the Board majority in

Lutheran Heritage Village-Livonia agreed that a rule prohibiting “abusive and profane language,” as well as rules prohibiting “verbal . . . abuse” and “harassment,” were lawful.

The majority in *Lutheran Heritage Village-Livonia* recognized that maintenance of a rule that does not expressly prohibit protected activity “can nonetheless be unlawful if employees would reasonably read it to prohibit Section 7 activity.” However, the majority said that employees in the *Lutheran Heritage* case would not reasonably read the rule in that way. “That is, reasonable employees would infer that the Respondent’s purpose in promulgating the challenged rules was to ensure a ‘civil and decent’ workplace, not to restrict Section 7 activity.” The majority also stated that where, as in this case, the rule does not refer to Section 7 activity, was not adopted in response to organizational activity, and had never been enforced to restrict Section 7 activity, “we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.”

In dissent, Members Liebman and Walsh observed that “the ill-defined scope of the Respondent’s ‘verbal abuse’ and abusive language” rules, as well as its “no harassment” rule, would reasonably tend to cause employees to “steer clear of the prohibited zone” and refrain from voicing disagreement with their terms and conditions of employment or vigorously attempting to organize skeptical workers.

The dissent explained that it relied “not only on the fact that the overbroad rules at issue here could reach activity that is protected, but also on the particular language of the rules, the Respondent’s maintenance of other facially unlawful rules, and the existence of seemingly duplicative rules as providing a context in which employees would reasonably construe the rules as interfering with their Section 7 activity.”

The dissenting Members asserted that, “[a]lthough we agree with our colleagues and the District of Columbia Circuit that employers have a legitimate interest in protecting themselves by maintaining rules that discourage conduct that might result in employer liability, . . . that interest is appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees’ free exercise of Section 7 rights.”

(Full Board participated.)

Charge filed by Vivian A. Foreman, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on Nov. 7, 2002. Adm. Law Judge Bruce D. Rosenstein issued his decision Feb. 3, 2003.

H.S. Care L.L.C., d/b/a Oakwood Care Center and N&W Agency, Inc. (29-RC-10101; 343 NLRB No. 76) Oakdale, NY Nov. 19, 2004. The Board, in a 3-2 decision, returned to longstanding Board precedent and held that employees obtained from a labor supplier cannot be included in a unit of permanent employees of the employer to which they are assigned unless all parties consent to the bargaining arrangement. [\[HTML\]](#) [\[PDF\]](#)

The majority of Chairman Battista and Members Schaumber and Meisburg found that such units, combining jointly-employed supplied employees and permanent employees solely employed by the user employer, are multiemployer units. Under Section 9(b) of the Act, consent is required for the establishment of such multiemployer units. Members Liebman and Walsh dissented.

The decision overrules the Board's decision in *M.B. Sturgis*, 331 NLRB 1298 (2000), which held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under the Act. *Sturgis* had overruled established precedent finding such units to be impermissible, absent consent. See *Lee Hospital*, 300 NLRB 947 (1990).

The majority in *Oakwood* stated:

By ignoring the bright line between employer and multiemployer units, *Sturgis* departed from the statutory directive of Section 9(b) as well as decades of Board precedent. We find that the new approach adopted in *Sturgis*, however well-intentioned, was misguided both as a matter of statutory interpretation and sound national labor policy.

The majority pointed out that in the units authorized by *Sturgis*, some of the employees are employed by the user employer while others are employed by the joint employer. "Thus, the entity that the two groups of employees look to as their employer is not the same. No amount of legal legerdemain can alter this fact."

The majority also stated that national labor policy was better served by limiting *Sturgis*-type units to cases where all parties consent. Allowing such units without consent opens the door to significant conflicts among the various employers and groups of employees participating in the collective bargaining process. The multiple employers are placed in the position of negotiating with one another as well as with the union. These are precisely the types of conflicts that Section 9(b) and the Board's community of interest tests are designed to avoid.

In dissent, Members Liebman and Walsh cited the rise of alternative work arrangements in response to global economic pressures on employers. They argued that workers in these arrangements would now effectively be barred from organizing labor unions, unless their employers consented. Rejecting the majority's "supposed strict construction" of the statute, the dissent pointed to the Board's "disturbing reluctance to recognize changes in the economy and the workplace and to ensure that our law reflects economic realities and continues to further the goals that Congress has set."

The dissenters described *Lee Hospital* as "a 10-year-old decision, missing any rationale, which itself broke with precedent." The dissenters argued that neither the language of the statute, nor its legislative history foreclosed a *Sturgis* unit. Rather, the Board has broad discretion to determine an appropriate bargaining unit. The dissent repeatedly cited the Board's statutory duty "to assure to employees the fullest freedom in exercising their rights." *Sturgis*

units facilitate collective bargaining, the dissenters observed, and pointed to the lack of empirical support for the majority's contrary view. They characterized the majority's decision as "at worst accelerating the expansion of a permanent underclass of workers" and predicted that it would "hasten the obsolescence of this statute."

In this case, the Regional Director found appropriate a petitioned-for unit of nonprofessional employees at Oakwood's facility in Oakdale, NY. The petitioned-for unit includes both employees who are solely employed by Oakwood and employees who are jointly employed by Oakwood and a personnel staffing agency, N&W. The majority reversed the Regional Director's decision and dismissed the petition filed by New York's Health and Human Service Union, 1199, Service Employees, finding that the petitioned-for unit is a multiemployer unit and neither Oakwood nor N&W consented to bargaining with the other in a multiemployer unit. Members Liebman and Walsh found that the Regional Director was correct in approving a joint unit per *Sturgis*.

(Full Board participated.)

Republic Die and Tool Co. (7-CA-46194; 343 NLRB No. 78) Belleville, MI Nov. 19, 2004. The Board amended the administrative law judge's conclusions of law to provide that by repudiating the January 16, 2000 to January 16, 2004 collective-bargaining agreement, the Respondent failed and refused to bargain collectively within the meaning of Section 8(d) of the Act and that by failing and refusing to provide Auto Workers Local 174, upon its request, with information relevant to its averred economic inability to comply with the wage and fringe benefits provisions of the agreement, the Respondent violated Section 8(a)(5) and (1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

Members Schaumber and Meisburg found no merit in the General Counsel's exception that the judge's recommended order did not contain affirmative relief for the Respondent's refusal to provide financial information to the Union. Member Liebman would grant the affirmative relief.

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by Auto Workers Local 174; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Detroit on Oct. 9, 2003. Adm. Law Judge Ira Sandron issued his decision Feb. 6, 2004.

Wal-Mart, Inc. (29-CA-18255, et al.; 343 NLRB No. 71) Las Vegas and Henderson, NV Nov. 15, 2004. The Board granted Charging Party UFCW's motion to strike pages 51-82 of Wal-Mart's answer to the Charging Party's brief on exceptions to the administrative law judge's decision (JD(SF)-33-04), but it granted the Respondent permission to file a responsive brief that conforms to the 50-page limit in accordance with the Board's Rules and Regulations. [\[HTML\]](#) [\[PDF\]](#)

The Charging Party requested and was granted permission to exceed the 50-page limit for its brief in support of exceptions. It filed exceptions and a 70-page brief in support. The Respondent filed an 82-page answering brief and the Charging Party filed a 10-page reply brief. In its motion to strike, the Charging Party argued that the Respondent failed to obtain permission to exceed the 50-page limit on briefs. The Respondent admitted it did not request permission, but claimed that it telephoned an employee in the Executive Secretary's office, who allegedly verified that, like extensions of time to file documents, page enlargements granted at one party's request are shared by all parties. The Respondent contended that even if it misinterpreted the conversation, the rationale for sharing an extension in a due date also applies to the sharing by all parties of a page enlargement, citing *P & M Cedar Products*, 282 NLRB 772 (1987).

The Board noted that Section 102.46(j) of the Board's Rules and Regulations indicates that any party that desires additional pages beyond the 50-page limit must request its own permission from the Board, which has been the Board's policy since the rule was established in 1982, and that any advice to the contrary was erroneous. Accordingly, it granted the Respondent permission to file a responsive brief that conforms to the 50-page limit (the Charging Party may refile a reply to the resubmitted responsive brief). Chairman Battista, in granting permission, relied in part on the Respondent counsel's assertion as to the telephone conversation that he allegedly had with the Board's offices. He assumed *arguendo* that the assertion is correct since there is no counter-assertion and there is no basis for discrediting the assertion made by counsel.

(Chairman Battista and Members Liebman and Meisburg participated.)

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Atlantic Communications Corp. (an Individual) Long Island City, NY Nov. 15, 2004. 2-CA-36066; JD(NY)-49-04, Judge Raymond P. Green.

Southwest Regional Council of Carpenters Local 184 and 1498 (New Star General Contractors, Inc., et al.) Salt Lake City, UT Nov. 12, 2004. 27-CC-877, et al.; JD(SF)-76-04, Judge Gregory Z. Meyerson.

Eagle Industries, Inc. d/b/a Skagit Harley-Davidson (Machinists District Lodge 160) Burlington, WA Nov. 15, 2004. 19-CA-28962, et al.; JD(SF)-75-04, Judge Mary Miller Cracraft.

Temp Masters, Inc. (Sheet Metal Workers Local 24) Uniondale, IN Nov. 19, 2004. 9-CA-40822; JD-112-04, Judge Arthur J. Amchan.

U Ocean Palace Pavilion, Inc. (an Individual) Brooklyn, NY Nov. 19, 2004. 29-CA-25985; JD(NY)-48-04, Judge Steven Fish.

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

J & D Masonry Inc. and Pyramid Masonry Construction Co., LLC, Alter Egos (Bricklayers Local 9) (7-CA-47407, 47547; 343 NLRB No. 73) Holt, MI November 19, 2004. [\[HTML\]](#)
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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

Gaetano & Associates Inc., New York, NY, 2-RC-22717, November 16, 2004
(Chairman Battista and Members Schaumber and Walsh)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Wright Nursing and Rehabilitation Center, Fairborn, OH, 9-RC-17918,
November 17, 2004 (Members Liebman, Schaumber, and Meisburg)

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Champion Home Builders Co., Claysbury, PA, 6-RC-12367, November 16, 2004,
(Chairman Battista and Members Liebman and Schaumber)
Sectek, Inc., Washington, DC and New Carrollton, MD, 5-RC-15727, November 17,
2004 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND DIRECTION/that Regional Director open and count ballots/

Enviro-Tech, Philadelphia, PA, 4-RC-20849, November 16, 2004, (Chairman Battista and Members Liebman and Schaumber)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Transit Management of Alexandria, Inc., Alexandria, VA, 5-RC-15721,
November 17, 2004 (Chairman Battista and Members Liebman and Schaumber)

***(In the following cases, the Board denied requests for review
of Decisions and Directions of Elections (D&DE) and
Decisions and Orders (D&O) of Regional Directors)***

Firstline Transportation Security, Inc., Nashville, TN, 17-RC-12297, November 17,
2004 (Members Schaumber and Meisburg; Member Liebman dissenting)
McNeil Security, Inc./ZKD, Inc., Rochester, NY, 3-RC-11490, November 17, 2004
(Members Schaumber and Meisburg, Member Liebman dissenting)

Miscellaneous Board Orders

**DECISION ON REVIEW AND ORDER [affirming
Regional Director's decision and direction of election]**

WGCI-FM & WGRB-AM, Clear Channel Broadcasting, Chicago, IL, 13-RC-21207,
November 19, 2004 (Members Schaumber, Walsh, and Meisburg)

**CERTIFICATION OF REPRESENTATIVE AS BONA FIDE UNDER
Section 7(B) of the Fair Labor Standards Act of 1938**

Grant County, Elbow Lake, MN, 18-WH-00006, November 15, 2004

**ORDER GRANTING REQUEST [of Petitioner
to withdraw objections and exceptions]**

Karcher Environmental, Inc., Anaheim, CA, 21-RC-20720, November 17, 2004

ORDER DENYING MOTION FOR RECONSIDERATION

Arbor Construction Personnel, Inc., Ann Arbor, MI, 7-RC-22440, November 17, 2004
(Members Schaumber, Walsh, and Meisburg)
Architectural Contractors Trade Association, Farmington, MI, 7-RC-22466,
November 17, 2004 (Members Schaumber, Walsh, and Meisburg)
